IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 23924-1-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
TIMOTHY JACK NEWTON,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	
	)	

KULIK, J. — A jury convicted Timothy Jack Newton of custodial assault. On appeal, he argues that there was insufficient evidence of intent to assault, and that the prosecutor committed misconduct in statements made to the jury about the credibility of witnesses. We hold there was sufficient evidence of intent, and that the prosecutor's comments on the credibility of witnesses were permissible. Therefore, we affirm the trial court.

FACTS

On August 26, 2003, Spokane County Corrections Officer David Bauer booked Mr. Newton into jail. Officer Bauer did a "pat down" search of Mr. Newton for weapons

or contraband. Report of Proceedings (RP) at 23-24. Officer Bauer requested Mr. Newton to bend over and "shake . . . out" his hair. RP at 45. Mr. Newton refused. Mr. Newton then took an aggressive posture and clenched his fists.

In response to this "fighting posture" Officer Bauer attempted to place Mr. Newton in a hair hold. RP at 26. Officer Bauer could not get a firm grip on Mr. Newton, who pulled away and punched Officer Bauer in the jaw. When Officer Bauer tried a second time, Mr. Newton again punched the officer. Officer Bauer testified that Mr. Newton's actions were not accidental and that the punches were harmful and offensive.

Mr. Newton resisted when corrections officers placed him in his holding cell. Later, in his cell, Mr. Newton claimed that he did not hit anyone, stating, "It wasn't me," and "I'm sorry." RP at 64. Corrections officers confirmed Mr. Newton made this denial and apology.

The State charged Mr. Newton with one count of custodial assault. At trial, Mr. Newton testified that he was assaulted by the officers because he was unable to remove his socks during the pat down search. Mr. Newton denied that he was asked to shake his hair out. He also denied that he took a swing at, or punched, any of the corrections officers.

The jury convicted Mr. Newton of custodial assault. As a first time offender, he was sentenced to two days confinement. This appeal followed.

ANALYSIS

1. Sufficiency of the evidence

Mr. Newton asserts the evidence was insufficient to establish the requisite intent to commit custodial assault. "In reviewing the sufficiency of the evidence, the question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). However, there must be substantial evidence that supports the elements of the crime charged. *State v. Cleman*, 18 Wn. App. 495, 498, 568 P.2d 832 (1977). Substantial evidence is "that quantum of evidence necessary to establish circumstances from which the jury could reasonably infer the fact to be proved." *Id*.

"When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A defendant claiming insufficiency of the evidence "admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom." *State v. Myers*, 133 Wn.2d 26, 37, 941 P.2d 1102 (1997).

In determining the sufficiency of the evidence, criminal intent may be inferred from conduct, and circumstantial evidence is not to be considered any less reliable than

direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980); *Myers*, 133 Wn.2d at 38. A fact finder is permitted to draw inferences from circumstantial evidence so long as these inferences are rationally related to the proven fact. *State v. Bencivenga*, 137 Wn.2d 703, 707, 974 P.2d 832 (1999). The existence of conflicting evidence "is not an adequate reason for granting a new trial when the verdict of the jury is otherwise supported by substantial evidence." *Bunnell v. Barr*, 68 Wn.2d 771, 777, 415 P.2d 640 (1966).

In Washington, assault is not defined by statute, and we therefore look to common law definitions. *Clark v. Baines*, 150 Wn.2d 905, 908 n.3, 84 P.3d 245 (2004). There are three recognized common law definitions of assault: (1) an attempt, with unlawful force, done with the intent to inflict injury on another; (2) an intentional and unlawful touching or striking of the person of another; and (3) an intentional act, with unlawful force, which creates a reasonable apprehension of bodily injury in another. *Id*. Under each definition, assault is an intentional act. *State v. Mathews*, 60 Wn. App. 761, 767, 807 P.2d 890 (1991).

Here, the State presented evidence that Mr. Newton took an aggressive posture and hit Officer Bauer twice with a closed fist. Officer Bauer testified that these acts did not appear to be accidental. The jury is permitted to infer criminal intent from Mr. Newton's conduct and the circumstantial evidence. Moreover, the mere fact that Mr. Newton

denied having intentionally hit the officer does not preclude a jury from reaching the opposite conclusion. The jury is permitted to discount theories it deems to be unreasonable. The jury's verdict was reasonable and based upon substantial evidence. Therefore, sufficient evidence supports the jury's verdict in this case.

2. Prosecutorial misconduct

Mr. Newton also alleges the prosecutor committed misconduct by expressing a personal belief as to the credibility of the witnesses.

A prosecutor is a quasi-judicial officer representing the people of the state, and is presumed to act impartially in the interests of justice. *State v. Case*, 49 Wn.2d 66, 70, 298 P.2d 500 (1956). A prosecutor may argue the facts in evidence and any reasonable inferences arising from those facts. However, a prosecutor is not permitted to state his or her personal belief about the credibility of the witnesses. *State v. Dhaliwal*, 150 Wn.2d 559, 577-78, 79 P.3d 432 (2003).

A defendant who alleges prosecutorial misconduct must establish both the prosecutor's improper conduct and its prejudicial effect. *Id*. at 578. Prejudice is established only when "'there is a substantial likelihood the instances of misconduct affected the jury's verdict.'" *Id*. (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). This court views any allegedly improper statements in the context of the prosecutor's entire closing argument, the other evidence discussed in the argument, and

the trial court's jury instructions. *Id*. at 578.

Prosecutorial misconduct in the form of improper argument "cannot be urged as error unless the aggrieved party had requested the trial court to correct it by instructing the jury to disregard it, and had taken exception to the court's refusal to do so." *Case*, 49 Wn.2d at 72. "If the prejudice could have been cured by a jury instruction, but the defense did not request one, reversal is not required." *Dhaliwal*, 150 Wn.2d at 578. Moreover, "[t]he absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). Mr. Newton did not object to the prosecutor's closing statement at trial and fails to identify which statements made by the prosecutor are alleged to be improper.

If Mr. Newton is complaining about the prosecutor's remarks on the consistency of the corrections officers' stories, Mr. Newton's complaints are without merit. "'It is not misconduct . . . for a prosecutor to argue that the evidence does not support the defense theory'" of the case. *State v. Brown*, 132 Wn.2d 529, 566, 940 P.2d 546 (1997) (quoting *State v. Russell,* 125 Wn.2d 24, 87, 882 P.2d 747 (1994)). Moreover, it is not misconduct to argue reasonable inferences that are based on the evidence. Here, the prosecutor stated that "the officers are quite consistent on what happened." RP at 147. The evidence

supports these remarks as they were based on evidence rather than on opinion. Therefore, the prosecutor did not commit misconduct.

In summary, there is sufficient evidence in this case to support the jury's finding that Mr. Newton intentionally assaulted Officer Bauer. Also, the prosecutor did not commit misconduct when he commented about the factual consistency between the officers' accounts of the evidence. Consequently, we find no error and affirm the trial court.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Kulik, J.

WE CONCUR:

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Sweeney, C.J.

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Schultheis, J.